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Dorinda A. Bradshaw

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**FEDERAL COMMUNICATIONS COMMISSION**

AUG 1 4 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

In Re Applications of:	)	WT DOCKET No.:	96-41
	)		
LIBERTY CABLE CO., INC.	)	File Nos:	
For Private Operational Fixed	)	708777	WNTT370
Microwave Service Authorization	)	708778, 713296	WNTM210
and Modifications	)	708779	WNTM385
	)	708780	WNTT555
New York, New York	)	708781, 709426,	WNTM212
	)	711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)
	)		

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Date: July 24, 1996

**HERITAGE REPORTING CORPORATION**

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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	)		

Room No. 4  
FCC Building  
2000 L Street, N.W.  
Washington, D.C.

Wednesday,  
July 24, 1996

The parties met, pursuant to the notice of the  
Judge, at 3:40 p.m.

BEFORE: HON. RICHARD L. SIPPEL  
Administrative Law Judge

Heritage Reporting Corporation  
(202) 628-4888

## APPEARANCES:

On behalf of The Commission:

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On Behalf of Time Warner Cable and Paragon Cable  
Manhattan Cablevision:

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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
(None)					

E X H I B I T S

<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>REJECTED</u>
(None)		

Hearing Began: 3:40 p.m.

Hearing Ended: 4:55 p.m.

1                   P R O C E E D I N G S

2                   JUDGE SIPPEL: Let's go on the record.

3                   Good afternoon. I have called this prehearing  
4 conference to determine whether or not to grant, based on a  
5 motion that Mr. Beckner filed, Time Warner, to determine  
6 whether or not the deposition of Mr. Barr, Mr. Howard Barr,  
7 should be taken. Mr. Barr is an outside counsel for  
8 Liberty.

9                   The motion was filed on the 19th of July, and the  
10 opposition from Time Warner came in this afternoon at my  
11 schedule.

12                  MR. BEGLEITER: From Liberty, Your Honor.

13                  JUDGE SIPPEL: Liberty. Thank you.

14                  I haven't received anything from the Bureau, but I  
15 think I have a good feel as to what the Bureau's position  
16 would be on this, maybe not, but we will hear.

17                  I wanted to -- to put this in context, and I am  
18 going to listen to you in just a minute, Mr. Beckner, but to  
19 put this in context, there are now pending, the motion for  
20 summary decision, which is awaiting a response by August  
21 13th, I believe.

22                  The issue that -- there is also a motion that was  
23 filed by Time Warner for a motion to add issues based on  
24 alleged misrepresentations, I believe, of Mr. Nourain and  
25 Mr. Price.

1 All right, now, there is also a motion -- rather,  
2 an issue on misrepresentation in the hearing designation  
3 order which goes over to the motion for summary decision.

4 So what I am trying to understand at this point is  
5 the fact that you have filed a motion to add issues based on  
6 Mr. Lehmkuhl's memorandum that would essentially involve Mr.  
7 Nourain and Mr. Price with respect to the alleged  
8 activities.

9 Now you want to depose Mr. Barr, who was not part  
10 of that sequence of events when you filed the motion to add  
11 the issues. And the Bureau has taken the position, not in  
12 the context of your motion here, but in terms of the motion  
13 for summary decision -- I'm sorry -- in terms of the motion  
14 to add the issues, that you have already got an issue for  
15 misrepresentation so why do we have to bother with another  
16 issue of misrepresentation.

17 All of these things, all of these wires are  
18 crossing here, and I am trying to figure out what it is that  
19 you are after with respect to Mr. Barr. Maybe you could  
20 enlighten me on that.

21 MR. BECKNER: Certainly, Your Honor. Bruce  
22 Beckner, for the record, for Time Warner Cable of New York  
23 City.

24 Also, as a preliminary matter, I just want to  
25 mention that Jim Kirkland, counsel for Cablevision, called

1 me earlier today and said he was unable to reschedule a  
2 meeting that he needed to reschedule in order to be here.  
3 So he wanted you to understand the reason for his absence,  
4 and he planned to be here, but he was unable to reschedule a  
5 meeting.

6 JUDGE SIPPEL: All right, thank you. No, I  
7 certainly don't take anything adverse.

8 MR. BECKNER: And certainly Cablevision has -- he  
9 has told me I can say that Cablevision has no objection to  
10 carrying on in their absence.

11 To respond to your question, both of the motions  
12 that you have alluded to are a result of the production of  
13 Liberty of the Lehmkuhl memorandum, the February 24th  
14 license inventory. We filed the motion to add an issue  
15 really out of an abundance of caution based on our  
16 experience with the Europa.

17 If you recall, the Europa, we sought to take some  
18 discovery regarding establishment of service to a building  
19 known as the Europa. Liberty argued that that discovery was  
20 outside the scope of the designated issues, and it was too  
21 late to add an issue. And the presiding judge sustained  
22 Liberty's position in that regard.

23 And, frankly, if the position of the Bureau and  
24 Liberty is that the matters that we are talking about in the  
25 motion to enlarge are within the scope of the issues already

1 designated, then that's fine with us.

2 The only new wrinkle that results is that we  
3 thought we would bring to your attention was a lack of  
4 candor in a statement made after the HDO was issued, in our  
5 view, as opposed to a lack of candor in a statement made  
6 sometime prior to the HDO, that is, in the paper proceedings  
7 on the applications themselves. Other than that there is no  
8 difference.

9 And certainly the Lehmkuhl memorandum, in our  
10 view, goes to both questions; that is, the accuracy and  
11 completeness of statements made in support of the  
12 applications as early as May 1995; the June 16, 1995, letter  
13 of Mr. Howard Barr written to the Commission in response to  
14 a Section 308(b) inquiry; as well as the surreply which was  
15 filed by Liberty in support of the caption applications or  
16 some of the caption applications, and that was filed, it's  
17 dated May 17, 1995.

18 JUDGE SIPPEL: Was that by Mr. Barr?

19 MR. BECKNER: Yes, that paper was signed by Mr.  
20 Barr and it was verified, the pleading was verified by both  
21 Mr. Nourain and by Mr. Price.

22 JUDGE SIPPEL: Was that the Exhibit 1 to your  
23 motion or is that something else?

24 MR. BECKNER: Yes, that was the Exhibit 1 to the  
25 motion to add the issue.



1 JUDGE SIPPEL: All right, you made a reference to  
2 the fact that there was -- now, all of these took place  
3 before the hearing designation order. You made reference to  
4 the fact of what you feel is a misrepresentation after the  
5 case was designated for hearing, is that --

6 MR. BECKNER: Yes, sir. The issue that we were  
7 specifically addressing in the motion to add issues is the  
8 question of whether or not Mr. Price and Mr. Nourain  
9 testified truthfully under oath in depositions taken in this  
10 proceeding. And I don't have the paper here with me, but as  
11 you recall we quoted specific passages from the transcripts  
12 where they made statements to the general effect that at the  
13 time that these unlicensed paths were turned on they had no  
14 idea that they didn't have a license for those paths. And,  
15 you know, short of producing a witness who would testify  
16 that he had a conversation with Mr. Price or Mr. Barr where  
17 he said, "You don't have licenses for those paths, sir," we  
18 think this memorandum, which says that, and which on its  
19 face indicates that it was sent to those people, is the  
20 equivalent.

21 That is, the memorandum says you don't have any  
22 STAs; here are your applications that are pending; here are  
23 your applications that are granted; and it lists by address  
24 those applications that are pending and granted. And, in  
25 fact, of the 15 locations identified by Mr. Barr in a letter

1 to the Commission dated June 16, 1995, 13 of those were  
2 identified in Mr. Lehmkuhl's memorandum as being the subject  
3 of pending applications, and most of those, in fact, had  
4 been activated before Mr. Lehmkuhl's memorandum was sent.

5 Let me just explain. I will just run down the  
6 list.

7 JUDGE SIPPEL: Well, before you do that --

8 MR. BECKNER: Okay.

9 JUDGE SIPPEL: -- I don't want to get too deep  
10 into that situation yet.

11 MR. BECKNER: Okay.

12 JUDGE SIPPEL: What I have I am still trying to  
13 get this, what's going on here procedurally on some kind of  
14 an even keel.

15 If there is a misrepresentation made as the case  
16 is being tried before a hearing officer, you have got a -- I  
17 mean, there can be a finding of misrepresentation right then  
18 and there. You don't even have to designate an issue. And  
19 on the other hand, if it was made -- now, I am making that  
20 statement, but what I really want find out from Mr. Weber is  
21 are you drawing -- I am obviously focused on your  
22 opposition, the Bureau's opposition to adding the issues.  
23 And you are saying that, well, we have already got  
24 misrepresentation in this case. So anything that comes  
25 under that rubric of misrepresentation we have already got

1 that covered.

2 What about the distinction that's being made here,  
3 that we have got a misrepresentation allegedly made in  
4 depositions after the hearing designation order?

5 MR. WEBER: The Bureau is not really looking at  
6 that, if it is indeed a misrepresentation that's necessarily  
7 being a new misrepresentation. Instead, it's a continuance  
8 of statements made prior to the designation order. Liberty  
9 has maintained all along that they did not learn of the  
10 unauthorized paths until either late April or early May,  
11 1995, and that was just repeated in the depositions. And so  
12 therefore, if, you know, if they were misrepresenting facts  
13 previously, they are continuing to do it.

14 And from our motion for a summary decision you get  
15 our view of whether or not they are misrepresenting facts  
16 previously. However, we are not looking at it as though  
17 it's a new isolated statement. It's just a continuation of  
18 the statements they have made all along, and that was why we  
19 really believe it is contained within the third of the four  
20 designated issued.

21 That issue doesn't put any type of time frame into  
22 it. It's just a -- it's a broad statement to determine  
23 whether or not Liberty has misrepresented facts relating to  
24 their premature operation of facilities.

25 JUDGE SIPPEL: Well, does it make a difference to

1 the Bureau as to whether or not Liberty -- the operational  
2 people at Liberty anyway -- had knowledge of this in late  
3 February as opposed to April or May?

4 MR. WEBER: Oh, that would certainly make a  
5 difference to us. If we learned that they were  
6 misrepresenting the facts, that they knew about it in  
7 February instead of April or May, we would then withdraw our  
8 support of the motion for summary decision. I mean, we  
9 would find that very severe, that they had been not telling  
10 us fully -- the full truth or being fully candid about when  
11 they learned about the premature operations.

12 JUDGE SIPPEL: Well, after seeing the Lehmkuhl  
13 memorandum and the argument that Mr. Beckner has made, how  
14 can that not be a substantial question, from the standpoint  
15 of the Bureau?

16 MR. WEBER: Well, as the Bureau pointed out in its  
17 comments, there are many factors we don't yet know, and some  
18 of them we have learned, or at least we have got more  
19 information from Liberty's opposition to the motion. The  
20 type of things we don't know for sure yet are things that  
21 have not been tested, or whether or not even Mr. Price or  
22 Mr. Nourain ever saw the Lehmkuhl memo. Indeed, it is  
23 addressed to them. But whether or not they actually  
24 received it, whether they read it upon receiving it. And  
25 the fact that the memo itself just lists numerous paths. If

1     you recall seeing the memo, it's very many pages long and it  
2     lists hundreds or at least dozens of different paths.

3             And we also know that they do get weekly reports  
4     which indicate which systems have been operated. However,  
5     because of the number of paths on there, we really believe a  
6     side-by-side comparison would have to be done, or some type  
7     of thing for them to realize, well, here it shows that the  
8     building at this address, the application is still pending  
9     on the Lehmkuhl memo, but over here on our weekly report the  
10    building at that address shows it's been activated.

11            I mean, they would have to do some type of  
12    comparison, and we don't know if that was ever done.

13            The Bureau does believe there are certain  
14    questions there and that is why we suggested there be some  
15    additional limited discovery on this issue. We don't yet  
16    feel the questions are of the magnitude that require us to  
17    withdraw our support from the motion for summary decisions  
18    at this time, however.

19            JUDGE SIPPEL: Well, if that's your position,  
20    that's your position. But it's -- well, I am not -- you've  
21    articulated it very clearly, and it is consistent with what  
22    you said in your pleading thus far.

23            So, anyway, I take it the Bureau does see that  
24    there is, at least that the waters are muddied enough that  
25    there should be some questions asked of some people who

1 might have some information, and let's get this thing  
2 cleared up.

3 MR. WEBER: That is correct.

4 JUDGE SIPPEL: That's right, okay.

5 Let me hear, if I might, for now from the Time  
6 Warner side on this.

7 MR. SPITZER: Your Honor, I guess I am just a bit  
8 confused. With respect to the motion to enlarge, I think  
9 our position was quite clear in the papers we submitted.  
10 With all deference to Mr. Beckner, I think Time Warner  
11 misstated a bit what was in the memorandum and what was not  
12 in the memorandum.

13 JUDGE SIPPEL: Well, before you get started down  
14 that road, now let me just tell you what I am interested in  
15 knowing.

16 I want to know what your position is with respect  
17 to clearing up these questions through deposition testimony  
18 of persons from Liberty and/or Mr. Barr. This is what I  
19 want to focus on.

20 MR. SPITZER: Well, those are --

21 JUDGE SIPPEL: I know Mr. Barr ---

22 MR. SPITZER: -- separate issues. They are  
23 separate issues, Your Honor.

24 JUDGE SIPPEL: I understand that.

25 MR. SPITZER: In our motion in opposition to Time

1 Warner's motion to enlarge we included affidavits from Peter  
2 Price and Behrooz Nourain which with great clarity responded  
3 to the issues that Mr. Beckner has raised. We maintain  
4 steadfastly there is not a contradiction in the record  
5 between the memorandum sent by Mr. Lehmkuhl to Liberty on  
6 February 24th, and through statements of Peter Price and  
7 Behrooz Nourain that they found out about the premature  
8 service in the time frames to which they testified in their  
9 depositions, and which is why it came back to what was in  
10 the memorandum.

11 And if you were to look at the memorandum, Your  
12 Honor, I think it would become clear that, as Mr. Weber  
13 stated, the memorandum itself does not say there is no  
14 license and you are providing service. The memorandum is  
15 merely a very -- and I don't say "merely" to diminish it.  
16 It is an exhaustive list of paths, very lengthy and  
17 detailed, and yet it does not contain the information  
18 necessary to reach the conclusion that there is premature  
19 service.

20 And therefore, the affidavits of Peter Price and  
21 Behrooz Nourain address this issue, and say our testimony  
22 was true and accurate and forthright. We didn't know until  
23 we were informed much after receipt of this memorandum, they  
24 have no recollection of seeing that memorandum. But even if  
25 they had seen it, it would have taken the type of inquiry in

1 an investigation that Mr. Weber described to reach that  
2 conclusion. And neither of them did that. Neither of them  
3 undertook that inquiry or investigation.

4 And these are the facts that were gone into in  
5 some detail in the depositions that have already been had,  
6 which is why we do not believe additional inquiries are  
7 necessary. We think they have answered those questions.

8 However, having said that, not that we join in the  
9 Bureau's application, we would perhaps respectfully remain  
10 silent on the issue, and say that if they feel compelled to  
11 ask additional questions on those limited issues which they  
12 specified in their papers of Mr. Behrooz Nourain and Mr.  
13 Peter Price, we would defer to their desire to do so because  
14 they have joined us in the motion for summary decision, and  
15 we feel at some level that they should -- if they feel those  
16 are issues, then they should be entitled to ask the  
17 questions.

18 But in terms of what is in the record, we are  
19 steadfast in our view that there are no inconsistencies, and  
20 there are no issues really that are raised when you look at  
21 the record in detail.

22 JUDGE SIPPEL: All right. Well, there is a  
23 difference between rather conclusory statements in  
24 affidavits as opposed to, okay, what did you do next, that  
25 kind of thing.



1 MR. SPITZER: That is correct, Your Honor.

2 JUDGE SIPPEL: We all know that.

3 MR. SPITZER: Absolutely, and that is perhaps to  
4 some extent why we are willing to defer to the Bureau's  
5 request that there be very limited additional inquiries of  
6 those individuals, and we have not objected in writing to  
7 that proposal.

8 But I would say again that what permeates Mr.  
9 Beckner's papers is the failure to distinguish between what  
10 could have been and what was. And I think -- I am not sure  
11 if Your Honor has yet read our motion for summary decision,  
12 of course, since it is not yet fully briefed, but those  
13 papers I think will very forthrightly state that there were  
14 error made, there were failures, there were structural  
15 mistakes, there was negligence, there were a myriad of means  
16 or ways through which Liberty and personnel at Liberty could  
17 have and should have found out, but they didn't.

18 And what Mr. Beckner has done very well is  
19 highlight one additional means by which Liberty should have  
20 known, but they didn't.

21 JUDGE SIPPEL: All right.

22 MR. SPITZER: Which is why when it comes to the  
23 issue of misrepresentation in terms of knowledge, in terms  
24 of intent, I think, quite frankly, the Bureau has been  
25 willing to join us because we are of a common view that

1     there was a failure of a significant magnitude reflected in  
2     the fine that Liberty has proposed to pay, is willing to  
3     pay. And yet there was never an intent to deceive, and that  
4     is a critical threshold, and I am quite confident -- I can't  
5     speak for Mr. Weber, that had there been any evidence of an  
6     intent to deceive the Bureau would not have joined us in  
7     this motion.

8             JUDGE SIPPEL: Well, all right.

9             MR. SPITZER: But, again, that is for --

10            JUDGE SIPPEL: That still is not answering my  
11     concerns. I mean, those questions all come up at a later  
12     time.

13            MR. SPITZER: Perhaps, Your Honor.

14            JUDGE SIPPEL: But I am attuned to what you are  
15     saying. I mean, I am finding phrases in Mr. Beckner's  
16     motion like, you know, what was clearly implicit in the  
17     surreply. Well, that's kind of a red flag, you know. And  
18     the Lehmkuhl memorandum suggests on page 7 that Liberty's  
19     counsel, Mr. Barr, had personal knowledge. Page 8, this  
20     would appear to undercut any basis for Mr. Barr's  
21     assertions.

22            So, you know, I am sensitive to those elements  
23     also. In other words, speculation is what I am getting at,  
24     Mr. Beckner.

25            MR. BECKNER: Your Honor.

1 JUDGE SIPPEL: Yes.

2 MR. BECKNER: I would like to respond, first, to  
3 your concerns. I mean, I will tell you, and none of the  
4 lawyers here, I think, have dealt with me before so they  
5 don't know whether it's true or not. But my personal style  
6 as a lawyer is not to lightly accuse somebody of lying. And  
7 perhaps the language that you just read and which Liberty  
8 has highlighted where I may qualify statements reflects that  
9 style.

10 At this point it is not necessary for any of us to  
11 determine whether or not Mr. Price, Mr. Nourain or Mr. Barr  
12 made a false statement to the government in violation of 18  
13 U.S. Code 1001, committed perjury or whatever. I believe  
14 that all I am required to show at this point is that there  
15 is a possibility that that happened, and because all we are  
16 asking for the right to do at this point is not for a  
17 finding that in fact that did happen, but for the  
18 opportunity to develop evidence to show whether it did or  
19 didn't happen, and that's why I said that the Lehmkuhl  
20 memorandum suggests and use those kind of phrases.

21 And, you know, if I am guilty of having a softball  
22 style, then I plead guilty to that.

23 Let me focus on Mr. Barr.

24 JUDGE SIPPEL: Now, just a minute. Let me respond  
25 to that.

1 I wasn't highlighting that language to be critical  
2 of what you have written. I am simply saying, I mean, the  
3 facts as I see them here today are, there is an element of  
4 speculation built into what you are seeking today. And on  
5 top of that I've got pending two very significant motions,  
6 or one summary decision motion, and motions to add issues.  
7 And I am trying to sort through all of this.

8 MR. BECKNER: I understand.

9 Well, if the position of the Bureau and Liberty is  
10 that -- and, you know, we haven't finished briefing the  
11 motion to add issues. But if their position is, is that the  
12 issues already designate -- encompass all of what we were  
13 talking about, then I don't feel a need to add an issue. I  
14 simply wanted to make -- establish my client's right to  
15 point to this evidence as going to an issue that's part of  
16 the case.

17 And if that's done by adding an issue or if that's  
18 done by a determination from the presiding judge that the  
19 issues designate, encompass those points, it makes no  
20 difference to me. I'm happy either way. And I want to make  
21 that clear.

22 Returning to Mr. Barr, there is some very specific  
23 statements that Mr. Barr made. On June 16, he wrote Mr.  
24 Michael Hayden at the Bureau.

25 JUDGE SIPPEL: Again, this is the surreply?

1 MR. BECKNER: No, this is --

2 JUDGE SIPPEL: This is something different?

3 MR. BECKNER: -- in response to a 308(b) letter,  
4 and it's Exhibit 1 to our motion for the order to take  
5 deposition.

6 JUDGE SIPPEL: All right.

7 MR. BECKNER: And this letter of Mr. Barr's was an  
8 exhibit to a letter of the same day written by Peter Price,  
9 the president of Liberty Cable. Both of which were  
10 responding to a letter from Mr. Hayden under 308(b),  
11 requesting information about Liberty's unauthorized  
12 activations.

13 And Mr. Barr writes, "As Mr. Nourain illustrates  
14 in his attached declaration, when the paths were rendered  
15 operational he was under two mistaken assumptions: (1) that  
16 STA requests covering the paths had been filed prior to the  
17 time Liberty commenced operation on those paths; and (2)  
18 that each STA request was granted prior to the time Liberty  
19 commenced operation on the paths."

20 Now, the problem with that statement is, is number  
21 one, as Mr. Barr knew or should have known since his firm  
22 did STA requests, there were no STA requests pending for  
23 these paths. And, secondly, the Lehmkuhl memorandum, which  
24 on its face indicates that it was copied to Mr.  
25 Barr, specifically states in the cover letter that -- let me

1 just get the --

2 JUDGE SIPPEL: This is a memorandum that he sent  
3 to Mr. Price?

4 MR. BECKNER: Yes, this is --

5 JUDGE SIPPEL: Yes, I have got that.

6 Who is, by the way, I know we have got HJB  
7 identified. Who is RFC?

8 MR. BECKNER: We presume it's Robert Corazzini.

9 JUDGE SIPPEL: Okay.

10 MR. BECKNER: Whose name has been identified by  
11 witnesses as having some connection to this account; that  
12 is, the Liberty representation.

13 Mr. Lehmkuhl's cover memorandum, it's the one-page  
14 thing, says, "Liberty is no longer operating under any  
15 STAs." I mean, I am just reading it. This says that. I  
16 mean, you don't have to look hard to find it.

17 JUDGE SIPPEL: All right.

18 MR. BECKNER: And then he explains where the table  
19 is. Now, this is addressed to Mr. Price and Mr. Nourain.  
20 So I want to know from Mr. Barr if his firm told Mr. Nourain  
21 you're not operating under any STAs, and he told that on  
22 February 24th, on what basis could he tell the Commission  
23 that Mr. Nourain thought he was operating on STAs with  
24 respect to 639 West End, which was commenced on February 14,  
25 before he got this memorandum; the Brittany, which was

1 started on January 16, before he got this memorandum; and so  
2 on.

3 I don't want Mr. -- I don't think we need lawyer's  
4 testimony. I think we need Mr. Barr's testimony. He made  
5 these statements to the Commission.

6 JUDGE SIPPEL: Well, okay, I understand that. But  
7 there could be maybe anywhere from eight to 80 explanations  
8 as to why he did it that way. I mean, I don't mean to say  
9 that these are bad reasons. I am simply saying that you  
10 don't know and I don't know.

11 MR. BECKNER: That's why we need to hear from him.

12 JUDGE SIPPEL: Well, I am not -- that's what I am  
13 not convinced about, that we have to hear from him. I think  
14 you have got a point -- I mean, I think you have made a good  
15 point with respect to what's been reported in Mr. Lehmkuhl's  
16 memorandum, and what you heard on the record from Mr.  
17 Nourain and Mr. Price. And, of course, I underscore that  
18 with the acknowledged concern that the Bureau has stated  
19 that it has for that information.

20 When you weigh that up against the fact that I am  
21 being asked to resolve this case without testimony on a  
22 summary decision motion, and the papers may be very  
23 informative, but I have got this aspect of it not  
24 unresolved, I'm going to be very difficult -- it's going to  
25 be very difficult for me to just, you know, to sign off on

1 that.

2 MR. BECKNER: Well, obviously, Your Honor, we are  
3 certainly not asking to resolve this case without a hearing,  
4 and I don't think that's a surprise to anyone.

5 JUDGE SIPPEL: Well, no, it doesn't surprise me.  
6 But on the other hand, I mean, what I am trying to do is I  
7 am trying to get down to what I think is the heart of the  
8 matter, the nub of the situation, and I think when you are  
9 still working on Mr. Barr, and again, I don't want to  
10 characterize what Mr. Barr did in any way, shape or form.  
11 All I am simply trying to say is that you have a burden of  
12 showing some reasonable, some probable cause that he has  
13 got, I'm paraphrasing now, but that's essentially what I am  
14 interested in.

15 I mean, is there some reason for me to think that  
16 he really has some significant information that is going to  
17 be, as they say, decisionally significant in this case? And  
18 I am having a hard time getting to that point. In other  
19 words, the probabilities, I don't think are there. But I  
20 could be wrong, of course.

21 Let me -- well, let me ask Time Warner. Is there  
22 anything else that you want to say about this in terms of  
23 discovery?

24 MR. SPITZER: I'm sorry. Liberty, Your Honor?

25 JUDGE SIPPEL: Liberty. I'm sorry.



1 MR. SPITZER: We wish we had subscribers of Time  
2 Warner.

3 (Laughter.)

4 JUDGE SIPPEL: See how generous I am to you.

5 MR. SPITZER: We distinguish, Your Honor, as I  
6 attempted to say earlier, between Mr. Barr and Peter Price  
7 and Behrooz Nourain and Mike Lehmkuhl, and that's why I said  
8 that we recognize and understand the concerns of the Bureau  
9 which they articulated in their response to the motion to  
10 enlarge, and do not oppose with any vehemence their request  
11 for additional questions to those three individuals, because  
12 we think those three individuals properly can answer the  
13 questions that Mr. Beckner has raised.

14 We also agree with Your Honor's analysis that Mr.  
15 Barr really is -- there is no nexus between anything Mr.  
16 Barr might know and the issues that are pending in this  
17 case. Mr. Barr was merely cc'd on this memorandum. He, in  
18 the letter that Mr. Beckner refers to at page 6 of his  
19 motion, is merely stating Mr. Nourain's focus at the time  
20 the letter was written. Mr. Nourain has testified about  
21 those beliefs, and Mr. Nourain's testimony corroborates that  
22 when Mr. -- that Mr. Barr's statements about Mr. Nourain's  
23 belief was accurate.

24 And so as we have said, if there are additional  
25 questions to Mr. Nourain, Mr. Price, Mr. Lehmkuhl on this